85-1345

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
October Term, 1985

J. A. CROSON COMPANY,
Petitioner,

v.

CITY OF RICHMOND,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

Under the Equal Protection Clause of the Fourteenth Amendment, is the level of scrutiny by the Courts of the factual record upon which a local governmental body adopts a requirement that white general contractors set aside 30% of the value of construction contracts for minority-owned businesses, which are not victims of discrimination by the governing body, satisfied by determining that there was evidence of societal discrimination against blacks in the construction industry and a negligible percentage of public contracts awarded minority contractors?

Is the Equal Protection Clause of the Fourteenth Amendment violated by an ordinance which fails to embody factual findings necessary to assure that the racial classification extends no further than necessary to remedy the effects of past discrimination?

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*The only parent company, subsidiary, or affiliate of J. A. Croson is Eastway Supplies, Inc., 1561 Alum Creek Drive, Columbus, Ohio 43209.

OPINIONS BELOW

The November 25, 1985 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 779 F.2d 181 (4th Cir. 1985) and is separately reprinted in the Appendix to this Petition, p. 1. The prior opinion of the United States District Court for the Eastern District of Virginia (CA-84-0021-R, December 3, 1984), also reprinted in the Appendix, p. 112, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, libery, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent part of the Ordinance and Minority Utilization Plan of the City of Richmond, more fully set out in the Appendix, p. 249, is as follows:

> All contractors awarded construction contracts by the City shall subcontract at least thirty per cent of the contract to minority business enterprises. Where the general contractor is a minority business enterprise this requirement shall be deemed to be met by the award.

STATEMENT OF THE CASE

A. Proceedings Below

This is a case in which J. A. Croson Company, an Ohio corporation, seeks damages, declaratory and injunctive

relief arising out of claims that ordinances of the City of Richmond which mandate that general contractors in the city projects subcontract at least 30% of each contract to minority-owned businesses contravene the Equal Protection Clause of the Fourteenth Amendment. The action was initiated in the Circuit Court of the City of Richmond alleging violations of the Equal Protection Clause, violation of 42 U.S.C. §1983, and violation of Virginia law requiring cities to exercise only those powers expressly conferred by the General Assembly. It was removed to the federal district court pursuant to 28 U.S.C. §1441(a) (1982). The district court assumed jurisdiction over the federal constitutional claims pursuant to 28 U.S.C. §1331 (1982) and over state law claims by pendent jurisdiction.

The District Court ruled for the City, finding that because Virginia law authorized the adoption of the City's procurement ordinance it authorized adoption of the Minority Utilization Plan, that the factual findings of City Council were sufficient, that the City acted reasonably in its application of the Plan, and that the plan did not violate the Fourteenth Amendment. The Court of Appeals affirmed.

B. The Evidence

The City Council of the City of Richmond, Virginia, enacted an ordinance creating a system of public procurement on December 20, 1982. This ordinance substantially paralleled the Virginia Public Procurement Act, which in §11-35(D)[1] permitted local governments to enact such ordinances based on "competitive principles." On April 11, 1983, the City adopted its "Minority

Utilization Plan" (the Plan) by amendment to the ordinance.

The Plan states that it is "enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects." Richmond Va. Code, Ch. 24.1, Art. VIII-A(C). (App. at 247) The Plan embodies the 30% set-aside for minority businesses, which are defined in the case of a stock corporation as those on which at least 51% of the stock are owned and controlled by Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or aleuts. Richmond, Va. Code, Ch. 24-1, Art. I(F)(Part B)(27.10,27.20). (App. at 233)

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[1]Va. Code §11-35(D) provides in pertinent part: Except to the extent adopted by such governing body, the provisions of this chapter also shall not apply...to any county, city, or town whose governing body adopts by ordinance or resolution alternative policies and procedures which are based on competitive principles and which are generally applicable to procurement of goods and services....

There is no requirement that minority businesses be located in the geographic area in order to participate in the set-aside.

The contract in question was for plumbing fixtures in the city jail. The fixtures were manufactured by either of two manufacturers especially for use in correctional facilities. The cost of the fixtures represented approximately 75% of the cost of the project. J. A. Croson Company submitted the low bid of $126,530, using a quote from the regular supplier of one of the manufacturers, which was not a minority supplier.

At the opening of the bids, the representative of a minority business which was a supplier of metal hoses advised J. A. Croson's regional manager that he could arrange to be approved as a supplier one of the manufacturers and supply the fixtures. A week later,

Croson requested a waiver of the minority utilization requirement on grounds that Continental was "unqualified." (Waivers must be suobtained within 10 days of the bid opening, or the contractor is in noncompliance; the city has three days to act on the request. App. 66-67.) On October 31, although not yet authorized by a manufacturer to supply the equipment, Continental supplied Croson a quote, which was $6,183.29 higher than the quote upon which Croson's bid was based.

The City rejected Croson's waiver request. Croson again requested a waiver on grounds that the price was excessive. The City rejected all bids and announced that it would re-bid the contract. Croson was advised that because the contract was being re-bid that he had no appeal from the decision.

The suit charged that the Plan as written and as applied unlawfully discriminated on the basis of race.

C. The City's Findings in Justification of the Ordinance

After a five hour council meeting the City held a two hour hearing in which five persons spoke against and two spoke for the need for the ordinance. A city employee introduced a tabulation of contracts awarded by the City which showed that .67% had been awarded to minority general contractors. There was no testimony of discrimination by the City. There were comments from proponents that blacks were victims of discrimination in the construction industry. There was no discussion of the basis for choosing a 30% set-aside figure.

REASONS FOR ALLOWANCE OF THE WRIT

I

CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

A.

A local governing body violates the Equal Protection Clause of the Fourteenth Amendment by the adopting a requirement that white general contractors set aside 30% of the value of constriction contracts for minority-owned businesses, which are not specific victims of discrimination by the governing body where the basis for adopting the set-aside is evidence of societal discrimination against blacks in the construction industry and a statistical desparity in the number of minority participants relative to their representation in the general population.

The issue in this case is the extent to which the Equal Protection Clause of the Fourteenth Amendment imposes standards for judicial scrutiny of the factual record upon which a local

governing body adopts a requirement that white general contractors set-aside 30% of the value of construction contracts for minority-owned businesses, but which are not specific victims of discrimination by the public body.

The case is not one of racial animus. The City Council adopted a poor plan, after a pro forma hearing, with provision for minimal administrative guidelines. But it probably felt that it was entitled to do so. The lower courts questioned the efficacy of the contractor's efforts to locate a minority supplier. But there is no suggestion that the contractor's actions were other than they would have been if he was seeking prices from white suppliers, and was told to use a white supplier who was unapproved by a manufacturer and submitted a high bid two weeks after the day of the bid opening.

But in its support of the City's attempt to increase minority participation

in City contracts, the Court of Appeals has been compelled to issue "what amounts to an invitation to the uninhibited and ill-considered enactment of racial distinctions in ordinances across the land." (App. 71, Wilkinson, J., dissenting.)

The Court of Appeals interpreted Fullilove as defining the constraints imposed by the Constitution on the adoption of preferences based on race.

The court viewed language from Justice Powell's concurring opinion in Fullilove, as determining the standard of review of the factual findings of a local governing body:

> "Unlike the review we make of a lower court decision, our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing evidence. Rather it is to determine whether the legislative history ... demonstrates that [the council] reasonably concluded that ... private and governmental discrimination had contributed to

> the negligible percentage of public contracts awarded minority contractors." App. 24, citing Fullilove, 448 U.S. at 503 (Powell, J., concurring).

Justice Powell was discussing the weight to be given a factual finding by Congress. The Court of Appeals failed to note Justice Powell's admonition that he was not concluding that "selection of a set-aside by other governmental body would be constitutional. 448 U.S. at 515-16, n.14.

The City Council actually made no findings of fact in adopting the plan. Speakers at a public hearing recognized that blacks generally were victims of discrimination. A city employee presented a tabulation which it was said indicated that .67 percent of the dollar value of city contracts was awarded to minority general contractors. The plan itself merely recited its purpose as being to increase participation of

minority businesses in public contracts. (App. 248).

On this basis, the Court of Appeals concluded that the information before Council was adequate to ensure that the plan was adopted to remedy the effect of past discrimination rather than advancing one group's interest over another. (App. 40)

Simply put, the practical effect of the decision below is that there is no meaningful constraint on the discretion of local governments to adopt minority set aside requirements. Any governing body with access to legal counsel can produce testimony that blacks are victims of discrimination and that black contractors receive some very small percentage of contracts awarded by governmental bodies. Thus the Court of Appeals has adopted a test of judging racial discrimination in public contracts

which would rule out no decision by a governmental body to adopt such a policy.

As was noted in the dissent by Judge Wilkinson,

> "Though the Supreme Court has not proscribed all preferences, its decisions have recognized the dangers inherent in the classification of American citizens on the basis of their race. To protect against such dangers, the Court has directed that the remedy of racial preferences be dispensed only under strict conditions. Here the majority simply disregards the need for such conditions. It abandons the caution required by Supreme Court precedent and issues what amounts to an invitation to the uninhibited and ill-considered enactment of racial distinctions in local ordinances across the land." (App. at 71)

In accepting the adequacy of the City's findings, the Court of Appeals seemed to recognize the paucity of the factual record when it said, "our task is not to determine if there was sufficient evidence to sustain the council majority's position in any traditional sense of weighing evidence." (App.

39-40). The Court of Appeals then went on to accord the "findings" of the City the same deference as is accorded the unique remedial powers of the Congress in the exercise of its "unique" enforcement powers pursuant to Section 5 of the Fourteenth Amendment. See Fullilove, 448 U.S. at 483-84 (Opinion of Burger, C.J.)

The Court of Appeals only required the "legislative history" to justify a conclusion that "private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." App. 40. This was a quote from the concurring opinion of Justice Powell in Fullilove, 448 U.S. at 503. But Justice Powell specifically noted that, "The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a

race-conscious remedy." Fullilove, 448 U.S. at 510.

In previous decisions, this Court has imposed a high degree of scrutiny upon race conscious programs. In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), it was held that no adequate basis for a minority admission program was established in the absence of any proof in Medical School admissions by the University. See 438 U.S. at 305, 311-15, 319-20. In Fullilove, the Chief Justice called for "a most searching examination." 448 U.S. at 491.

There is ample precedent for scrutinizing the factual basis for state and local actions which impact upon constitutional guarantees. In United Building and Construction Trades Council of Camden County and Vacinity v. City of Camden, 475 U.S. 208 (1984), held that to justify the validity of an ordinance

under the Privileges and Immunities Clause, there must be a "substantial reason" for the difference in treatment. Moreover, the means employed by the challenged statute must be closely related to the interests served by the statute. Toomer v. Witsell, 334 U.S. 385, 396 (1948). No reason is apparent as to why the factual basis for racial classifications by a city government should be accorded more deference than classifications based on residence.

A number of cases are pending before this Court which involve issues of the nature and adequacy of findings necessary to justify voluntary or court ordered minority employment preferences. See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), Rev. granted ____ U.S. ____, 106 S.Ct. 591 (1985); Local 28, Sheet Metal Workers v. EEOC, 753 F.2d 1172 (2d Cir.

1985), Rev. granted, ___ U.S. ____ 106 S.Ct. 58 (1985). Petitions for certiorari are pending in the Corporate City of South Bend v. Janowiak, 750 F.2d 557 (7th Cir. 1984) No. 84-1936, filed June 10, 1985, and in Devereaux v. Geary, 765 F.2d 268 (1st Cir. 1985), No. 85-492, filed September 19, 1985.

This case presents similar issues in the context of a contract set aside for minority businesses. There is no identified act of discrimination by the City of Richmond against any minority contractor. The adequacy of findings to support race conscious contract set-asides should be determined at the same time the Court rules on the sufficiency of findings necessary for voluntary affirmative action programs.

B.

A local governing body violates the Equal Protection Clause of the Fourteenth Amendment where the governing body fails to

> make factual findings necessary to ascertain whether a contract set-aside in favor of minority businesses is carefully tailored to assure that the racial classification extends no further than necessary to remedy the effects of past discrimination.

The need here is to carefully tailor the legislation to avoid adopting an ordinance based on perceived need not founded in fact. Fullilove, 448 U.S. at 480. (Burger, C.J.)

In addition to challenging the inadequacy of the findings, a number of additional defects in the Plan and in the provisions for its administration were challenged. These were:

> (1) There is no reasonable relationship between the 30% minority set-aside and the number of minority contractors available in the City to perform 30% of the City's construction contracts;
>
> (2) The waiver provision does not permit a waiver from the MBE requirements where a minority subcontractor's quote is non-competitive or where a minority subcontractor fails to give notice in advance of his desire to

participate on a particular City project, and the waiver provision lacks an adequate appeals procedure, thereby reducing the 30% set-aside to a mandatory quota with an inflexible waiver provision;

(3) City Council never considered the efficacy of alternative remedies before adopting a remedial measure based on race discrimination;

(4) The City's Plan is overinclusive in that its benefits extend to those minority contractors who have not been "economically or socially disadvantaged;"

(5) The City's Plan is overinclusive in that it has no geographical limitations, thus extending the benefits of the program to minority contractors outside of any relevant area;

(6) The Plan is overinclusive in that minority group members such as Eskimos, Aleuts, and "Spanish-speaking" are entitled to remedial relief where there has been no evidence that such minority group members have suffered illegal discrimination in public contracting in the City.

(7) Minorities may also bid as general contractors and be exempt from the 30% requirement.

The contractor also contended that under Virginia law, unlike other

jurisdictions authorized to adopt contract set-asides, a locality had to be given authority from the state to enact legislation on any subject. The Court of Appeals found that the authorization to enact procurement ordinances was authority to adopt the ordinance at issue here. (App. 15-24, 75-91) While this is an issue of state law, and therefore not asserted as an independent ground of review in this petition, the lack of explicit, well considered state legislation bears on the difficulty of ascertaining the manner in which the City's ordinance was designed to ameliorate past discrimination.

Without an adequate basis for factual findings a court can determine that the remedy is carefully tailored only if it is certain what conduct is to be redressed. See Valentine v. Smith, 654

F.2d 503, 508 (8th Cir.), cert. Denied, 454 U.S. 1124 (1981).

The ordinance on its face cannot be said to remedy past discrimination. On its face it is in no way inconsistent with the bald racial preference which substantial factual findings would guard against. (Wilkinson, J., dissenting) (App. 93). Nothing in the procedures for administration of the ordinance reflect any concern for administration of the ordinance to avoid the pitfalls which this court has frequently identified in the past.

While the Court of Appeals did not address each of these factors, it found the procedure "adequate" as applied to the plaintiff. App. 32-33.

While the Court of Appeals recognized a need for careful scrutiny, the fact is that the Court basically affirmed the City's actions without

requiring any meaningful review. Scrutiny that is "strict in theory" has often proved "fatal in fact." Bakke, 438 U.S. at 362; Gunther, "The Supreme Court, 1971 term -- Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1, 8 (1972).

In the present case, the minimal factual record before City Council affords no basis for determining whether any of the provisions of the Ordinance and Plan are carefully tailored. There is no evidence of the scope of discrimination at which the program is aimed. (App. at 102-03) (Wilkinson, J., dissenting) The nexus between violation and remedy was left to conjecture. See Firefighters Local Union, No. 1784 v. Stotts, ____ U.S. ___ 104 S.Ct. 2576, 2588 (1984).

In Bratton v. City of Detroit, 704

F.2d 878, 889 (6th Cir.) vacated and remanded on other grounds, 712 F.2d 222 (6th Cir. 1983), cert. denied ____ U.S. ____, 104 S.Ct. 703 (1984), for instance, the inference of intentional discrimination which arose from statistical desparity was supported with detailed evidence of intentional discrimination in the relevant employment context.

Similarly, the lack of any factual basis for the 30% figure on the set-aside increases the likelihood of an overbroad imposition on non-minority contractors. Nor is there any indication that any problem of interest to the City of Richmond is served by the extension of the set-aside to minorities outside some relevant geographical area. Nor is there any indication that as to why non-disadvantaged "Spanish-speaking" or

"Aleuts" should be granted the right to participate in the set-aside.

The Court of Appeals noted that three circuits have approved minority set-asides in public contracts. However, the present ordinance is so defficient on its factual basis and in the provisions for its administration that the Fourth Circuit would have had to have decided the case other than it did in order to be consistent with the other circuits.

The granting of this petition and subsequent reversal by this Court of the decision of the Court of Appeals would be consistent with the holdings in the other circuits.

In Ohio Contractors Association v. Keip, 713 F.2d 167, 1969 (6th Circuit 1983) the court approved a program enacted pursuant to state statute, which imposed flexible goals. South Florida Chapter of the Associated General Contractors of America, Inc. v.

Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir.), cert. denied ___ U.S. ___, 105 S.Ct. 220 (1984), involved a detailed and specific factual record and showing of need for the plan as adopted, as well as a meticulous scrutiny by the district court. Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981) was vacated on grounds that the set-aside was contrary to the state's requirement that contracts be awarded the low bidder. 457 U.S. 594 (1982). Accord Associated General Contractors v. San Francisco Unified School District, 616 F.2d 1381 (9th Cir. 1980).

The cases in the federal and state courts have not yet evolved firm precedent in racial set-aside cases. The ruling of the Fourth Circuit, with its minimal level of scrutiny, departs substantially from the care with which

the other courts have approached the issues. The standard enunciated by the Fourth Circuit is reminiscient of another case in which a racial classification was upheld as a "reasonable regulation, and with respect to which there must necessarily be a large discretion on the part of the legislature." Plessy v. Ferguson, 163 U.S. 537, 550 (1896).

Unless the minimal factual basis for enacting race-based preferences accepted in this case by the Court of Appeals is reversed, localities will be entitled to adopt such preferences without procedural protections simply by stating that blacks are victims of discrimination and do not own construction companies to the same extent as whites.

CONCLUSION

For the foregoing reasons the Petitioner requests that the Court grant the Petition for Writ of Certiorari to

the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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